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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

E. J. LEIZERMAN

Petitioner,

v.

TOLEDO BAR ASSOCIATION

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

PETITION FOR A WRIT OF CERTIORARI

Michael E. Tankersley
(*Counsel of Record*)
Alan B. Morrison
Public Citizen Litigation Group
2000 P Street, N.W., Suite 700
Washington, D.C. 20036
(202) 833-3000

Mark H. Aultman
Charles W. Kettlewell
150 E. Wilson Bridge Road
Suite 200
Worthington, Ohio 43085
(614) 436-2750

Counsel for Petitioner

January 26, 1993

38 pp

QUESTIONS PRESENTED*

1. Where federal courts have declared that it is ethically permissible for lawyers to guarantee their clients' loans for medical and living expenses that the clients need to withstand delays in litigation, may states, consistent with the Supremacy Clause, prohibit lawyers from guaranteeing such loans when representing Federal Employers' Liability Act claimants in federal court?

2. Does a state prohibition on attorneys guaranteeing their clients' loans for medical and living expenses that the clients need to withstand delays in litigating their personal injury claims unconstitutionally impair the rights of access to the courts recognized under the First and Fourteenth Amendment, where the state concedes that the loan guarantees are not used to solicit clients, and do not compromise the attorneys' independent professional judgment?

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* In addition to parties the listed in the caption here, attorney Michael E. McGill was also a party to the proceedings below as a respondent, with petitioner Leizerman. *See* A1, A8, A10.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

OPINIONS BELOW 1

JURISDICTION 2

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

A. Evidence Concerning Loans to Clients. 3

B. Findings and Decisions of the Board of Grievances and Discipline and the Supreme Court of Ohio. 7

SUMMARY OF REASONS FOR GRANTING THE WRIT 11

REASONS FOR GRANTING THE WRIT 12

I. OHIO'S APPLICATION OF ITS PROHIBITION ON LOAN GUARANTEES FOR LIVING EXPENSES TO LOANS FOR FEDERAL FELA CLAIMANTS, WHEN SUCH GUARANTEES HAVE BEEN APPROVED BY THE FEDERAL COURTS, PRESENTS AN IMPORTANT ISSUE UNDER THE SUPREMACY CLAUSE THAT SHOULD BE RESOLVED BY THIS COURT 16

II. STATE RULES PROHIBITING ATTORNEYS FROM GUARANTEEING LOANS FOR CLIENTS WHO NEED FINANCIAL ASSISTANCE TO WITHSTAND LITIGATION DELAYS IMPAIR RIGHTS OF ACCESS TO

THE COURTS PROTECTED BY THE FIRST AND FOURTEENTH AMENDMENTS, AND PRESENT IMPORTANT CONSTITUTIONAL ISSUES THAT SHOULD BE SETTLED BY THIS COURT. 20

A. The First Amendment 21

B. Due Process 24

C. Equal Protection 27

CONCLUSION 29

TABLE OF AUTHORITIES

Cases: **Page**

Bates v. State Bar of Arizona, 433 U.S. 350 (1977) . . 22

Baylson v. Disciplinary Board of the Supreme Court of Pennsylvania, 764 F.Supp. 328, 348-49 (E.D. Pa. 1991) 19

Boddie v. Connecticut, 401 U.S. 371 (1971) 16, 24

Brady v. Southern Railway Co., 320 U.S. 476 (1943) 16

Brotherhood of Railroad Trainmen v. Virginia, 377 U.S. 1 (1964) 12, 16, 18, 21, 22

Brown v. Western Railway of Alabama, 338 U.S. 294 (1949) 16, 18

Central Vermont Railway Co. v. White, 238 U.S. 507 (1915) 17

Committee on Professional Ethics v. Bitter, 279 N.W.2d 521 (Iowa 1979) 15

County of Suffolk v. Long Island Lighting Co., 710 F. Supp. 1407 (E.D.N.Y. 1989) 19

Dice v. Akron, Canton & Youngstown Railroad Company, 342 U.S. 359 (1952) 16

Gentile v. State Bar of Nevada, ___ U.S. ___ (1991) 22

Goldberg v. Kelley, 397 U.S. 254 (1970) 25, 29

Gulf Oil Co. v. Bernard, 452 U.S. 89 (1981) 19

Jahn v. Champagne Lumber Co., 157 F. 407 (W.D. Wisc. 1908) 17

Lindsey v. Normet, 405 U.S. 56 (1972) 27, 28, 29

Little v. Streater, 452 U.S. 1 (1981) 16, 24, 27

Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) 20, 24, 27

Louisiana State Bar Ass'n v. Edwins, 329 So. 2d 437 (La. 1976) 8, 15, 20, 25

Mahoning County Bar Ass'n v. Ruffalo, 176 Ohio St. 263, 199 N.E.2d 396 (1964), *cert. denied*, 379 U.S. 931 (1964) 6, 13

Matthews v. Eldridge, 424 U.S. 319 (1976) 24

Monessen Southwestern Railway Co. v. Morgan, 486 U.S. 330 (1988) 16

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) 24

NAACP v. Button, 371 U.S. 415 (1963) 21, 22

Norfolk and Western R. Co. v. Liepelt, 444 U.S. 490 (1980) 16

Ortwein v. Schwab, 410 U.S. 656 (1973) 27

People ex rel Chicago Bar Ass'n v. McCallum, 341 Ill. 578, 173 N.E. 827 (1930) 13

In re Primus, 436 U.S. 412 (1978) 15, 21, 23

In re R.J.M., 455 U.S. 191 (1982) 22

Rand v. Monsanto Co., 926 F.2d 596
(7th Cir. 1991) 19

In re Ratner, 194 Kan. 362, 399 P.2d 865 (1965) ... 23

Rinaldi v. Yeager, 384 U.S. 305 (1966) 27

In re Ruffalo, 249 F. Supp. 432
(N.D. Ohio 1965) 6, 12, 17

In re Ruffalo, 390 U.S. 544 (1968),
reversing, 370 F.2d 447 (1966) 6, 17

Shapero v. Kentucky Bar Ass'n,
486 U.S. 466 (1988) 22

In re Snyder, 472 U.S. 634 (1985) 17

Sperry v. Florida, 373 U.S. 379 (1963) 17

In re Teichner, 75 Ill. 2d 88,
387 N.E.2d 265 (1979) 20

United Mine Workers v. Illinois State Bar Ass'n,
389 U.S. 217 (1967) 18, 21, 22

United States v. Kras, 409 U.S. 434 (1973) 26

Waldman v. Waldman, 118 A.D.2d 577,
499 N.Y.S.2d 185 (2d Dep't. 1986) 14, 15

*Walters v. National Association of
Radiation Survivors*, 473 U.S. 305 (1985) 26

Zauderer v. Office of Disciplinary Counsel,
471 U.S. 626 (1985) 9, 15, 21, 22, 24

Statutes and Rules

Federal Employers' Liability Act (FELA), 45 U.S.C. § 51-60 2

Ala. Rules of Prof. Conduct, Rule 1.8(e)(3) 15

D.C. Rules of Prof. Conduct, Rule 1.8(d) 15

Minn. Rules of Prof. Conduct, Rule 1.8 . . . . . 8, 15

N.D. Ill., Local Rules, Gen. R. 39 17

N.D. Rules of Prof. Conduct, Rule 1.8(e)(3) 15

Ohio Code of Prof. Responsibility, DR 5-103 . . *passim*

Ohio Code of Professional Responsibility, EC 5-7, 5-8 . . . . . 7, 28

Ohio Gov. Bar R. V 9

Other Materials

ABA, Final Draft of the Model Rules of Professional Conduct, 67 *ABA Journal* (Spec. Supp., Oct., 1981) 14

ABA Formal Opinion No. 288 (Oct. 11, 1954) 13

ABA, Model Code of Professional Responsibility, DR 5-103 (1969) 7, 13, 14

ABA, Model Rules of Professional Conduct, Rule 1.8(e) (1983) 13, 14

ALI, Tentative Draft No. 4, *Restatement of the Law Governing Lawyers* (April 10, 1991) 14, 26

Annotation, 8 A.L.R. 3d 1155 (1966) 13

G. Hazard and W. Hodes, *The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct*, 274 (2d Ed. 1992 Supp.) 14

Note, *Guaranteeing Loans to Clients Under Minnesota's Code of Professional Responsibility*, 66 Minn. L. Rev. 1091 (1982) 13

Note, *Loans to Clients for Living Expenses*, 55 Cal. L. Rev. 1419 (1967) 13

C. Wolfram, *Modern Legal Ethics* (1986) 7, 14, 26

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OPINIONS BELOW

The opinion of the Supreme Court of the State of Ohio is reported at 64 Ohio St. 3d 669, and is reprinted in the Appendix to this petition at pages A1-6. The Findings of Fact, Conclusions of Law, and Recommendation of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio is not reported, and is reprinted in the Appendix at pages A7-14.

JURISDICTION

The decision of the Supreme Court of Ohio was issued on September 16, 1992. A1. A timely petition for rehearing by petitioner E.J. Leizerman was denied on October 28, 1992. A15. This Court has jurisdiction under 28 U.S.C. § 1257.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

DR 5-103(B) of the Code of Professional Responsibility of the State of Ohio provides as follows:

> While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to his client, except that a lawyer may advance or guarantee the expenses of litigation, including court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence, provided the client remains ultimately liable for such expenses.

Petitioner also relies on the First Amendment and Fourteenth Amendments to, and the Supremacy Clause in Article VI of, the Constitution of the United States, which are set forth in the Appendix at A16.

STATEMENT OF THE CASE

The Toledo Bar Association brought disciplinary proceedings against Petitioner E.J. Leizerman for assisting injured clients in obtaining bank loans for medical and living expenses pending delays in resolution of their claims for lost income and other compensation under the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60 ("FELA"). The Ohio Board of Commissioners on Grievances and Discipline found that petitioner had not engaged in any improper solicitation, that the loans were given only to existing clients who needed the money to withstand delays

in litigation, and that the loan guarantees had not interfered with petitioner's obligation to exercise independent professional judgment on behalf of his clients. Nonetheless, the Board and the Ohio Supreme Court concluded that DR 5-103(B) of the Ohio Code of Professional Responsibility, which states that a lawyer shall not guarantee financial assistance to a client, except litigation expenses, flatly prohibits a lawyer from guaranteeing loans for medical or living expenses, even under the circumstances presented here.

Petitioner seeks review by this Court because Ohio's prohibition on guaranteeing loans needed to survive litigation delays forces FELA claimants to forfeit their right to trial and accept inadequate settlements. This application of the Ohio rule is preempted by federal court decisions holding that such loans are appropriate because they allow FELA claimants to vindicate their rights. In addition, it violates rights of access to the courts recognized by this Court's decisions under the First and Fourteenth Amendments.

A. *Evidence Concerning Loans to Clients.*

Petitioner E. J. Leizerman has been a member of the Ohio Bar since 1976. His primary area of practice is representing personal injury claimants, and the majority of his cases involve claims under the FELA. Apart from this case, he has never been the subject of a disciplinary proceeding. A2, A11. Petitioner cooperated fully with the Bar Association's investigation, and the hearing in these proceedings was conducted on the basis of stipulated facts, exhibits, affidavits, and one-day of live testimony, *see* A8-10, which established the following facts about the loans at issue.

Petitioner and his former associate, Michael E. McGill, represented several personal injury claimants who were unable to work due to their injuries, and lacked any

other adequate sources of income. Because of court delays, obtaining a hearing on their claims for lost wages and other compensation could take two to four years. Hearing Tr. at 33, 42. During this period, the claimants were left without funds for medical treatment and support. Without financial assistance, they would have been forced to settle their claims "on the basis of desperation and not the reasonable value" of their case. A22 (Affidavit of Jerry W. Smith ¶ 8).

The evidence also showed that the railroad industry, taking advantage of the economic pressure that prolonged litigation places on unaided personal injury claimants, "intentionally attempts to delay FELA cases in order to force injured employees to settle their claims." A12. A retired claims adjuster for Consolidated Rail Corporation stated that the carrier "frequently and purposely delayed the resolution of and settlement of cases," particularly with respect to persons who were unrepresented or known to have no sources of income, and that these practices enabled it "to negotiate settlements with these persons on a greatly reduced basis and in amounts which were, in my opinion, grossly low and inadequate." A18 (Affidavit of Ron W. Ward, ¶¶ 5, 6). Consequently, the investigator stated, it is not uncommon for attorneys to advance funds or guarantee loans in order to provide claimants with living expenses while awaiting resolution of their claims. *Id.* ¶ 4.

To aid clients who faced financial hardship, Mr. Leizerman and Mr. McGill assisted them in obtaining loans from a local bank by signing as co-makers of the loans. The loan notes were drawn in amounts of a few thousand dollars, rolled over periodically and renewed, with additions, if necessary, on a ninety-day basis. A9, A11; Hearing Tr. at 31-35. In each instance, the attorneys made clear that the clients were ultimately responsible for repaying the loan. A12, A13. The loan proceeds were

used only for medical and/or living expenses during pending litigation or settlement negotiations. A11-12. In addition, the possibility of obtaining loans was never used as a basis for advertising or solicitation, but was only discussed with existing clients who raised the need for such assistance after the attorney-client relationship had been established. A11, A13.

The loans allowed clients to endure pretrial delays and obtain judgments or settlements that were more favorable than the offers made by the defendants when the claimants were facing financial difficulties. *See, e.g.*, A19-20: Hearing Tr. at 99-100, 193-94. The clients who obtained these loans attested that they were satisfied with the handling of their cases, and had no complaints concerning the loan process or the representation they received. A12, 13.

Petitioner deliberately limited the clients that he assisted in obtaining loans to clients pursuing claims under the FELA. A8-9. Consequently, his conduct (as distinguished from Mr. McGill's) only resulted in advancing funds to FELA claimants. A2, A11.[1] All the cases at issue in the disciplinary proceeding for which petitioner was responsible were filed in the federal courts in Ohio, which have held that it is permissible for lawyers to guarantee loans for living expenses of clients who need financial assistance to withstand delays in litigation. Hearing Tr. at 156. Indeed, the Ohio and federal court precedents on this issue are in direct conflict. In 1964 the

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[1] Nine of the twelve loans involved in the disciplinary proceeding were for FELA claimants and were procured by both attorneys; the other three loans for non-FELA claims were procured by Mr. McGill alone. The Board found that, although Mr. Leizerman signed notes for the non-FELA cases after funds had been disbursed in order to protect the integrity of other FELA loans, his actions did not result in advancing funds to non-FELA clients. A11, A8-9.

Supreme Court of Ohio, interpreting the Canons of Professional Ethics adopted by Ohio at that time, suspended an attorney because he advanced small sums of money for living expenses to two recently widowed clients pursuing claims under the FELA for the death of their husbands. *Mahoning County Bar Ass'n v. Ruffalo*, 176 Ohio St. 263, 199 N.E.2d 396 (1964), *cert. denied*, 379 U.S. 931 (1964). The district court for the Northern District of Ohio then reviewed this decision, but refused to impose discipline against Mr. Ruffalo for this same conduct because it concluded that advancing funds to permit clients to withstand delays in litigation under FELA was not unethical or improper. *In re Ruffalo*, 249 F. Supp. 432 (N.D. Ohio 1965). The court expressly rejected the Ohio Supreme Court's views, and determined that prohibiting advances to assist a needy client in meeting living expenses "is not in consonance with this Court's concept of justice or the underlying purposes of the Canons of Professional Ethics," because, among other things, banning such advances would undermine the rights of plaintiffs in FELA litigation. *Id.* at 440-45.[2] In the disciplinary proceeding below, petitioner established that the federal district court for the Northern District of Ohio still follows the views announced in *In re Ruffalo*, and had specifically approved petitioner's request for permission to advance funds for living expenses to a FELA claimant who need the funds because of litigation delays. *See* A24-26.

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[2] The Sixth Circuit, in a separate disciplinary proceeding, declined to address whether the loans made by Ruffalo constituted a valid basis for disbarment, but relied on the Ohio disciplinary board's findings to disbar Ruffalo on alternative grounds. This Court reversed the Sixth Circuit's decision, finding that Ruffalo had been denied due process in the state board's hearing on the disciplinary charges. *In re Ruffalo*, 390 U.S. 544 (1968), *reversing*, 370 F.2d 447 (1966).

B. *Findings and Decisions of the Board of Grievances and Discipline and the Supreme Court of Ohio.*

In October 18, 1990, the Toledo Bar Association filed complaints against petitioner and Mr. McGill, alleging that the loans described above violated DR 5-103(B) of the Ohio Code of Professional Responsibility, which is identical to the same provision in the American Bar Association ("ABA") Model Code of Professional Responsibility. *See* p. 1, *supra*. The stated purpose of this Rule is to prevent attorneys from obtaining a financial interest in the outcome of litigation that would interfere with the exercise of the attorney's independent professional judgment on behalf of a client.[3] At times, the Rule is also defended on the ground that it prevents attorneys from using the promise of advances to solicit clients.[4]

Petitioner argued that DR 5-103(B) should be construed narrowly so that it did not prohibit guaranteeing loans for existing clients who needed financial assistance to obtain their day in court, because applying the rule to such situations did not serve the interests the Code was intended to promote and, if so applied, (i) Ohio's authority to apply the rule to loans made to assist FELA claimants was preempted by the federal court's approval of such loans; and (ii) the rule would be unconstitutional under

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[3] *See* Ohio Code of Professional Responsibility, EC (Ethical Consideration) 5-8 ("A financial interest in the outcome of litigation also results if monetary advances are made by the lawyer to his client."); C. Wolfram, *Modern Legal Ethics*, § 9.2.3 at 507 (1986).

[4] *See* A6, (Opinion of Holmes, J., dissenting) ("The basic purpose underlying the Disciplinary Rule addressed in this matter is to curtail or regulate the unprofessional solicitation of clients through the advancement of monies, or the direct assistance in attorney monies, during the course of litigation."); C. Wolfram, *supra*, § 9.2.3 at 507.

the First Amendment, and the Due Process and Equal Protection clauses of the Fourteenth Amendments.[5]

In support of his constitutional challenges, petitioner presented testimony from the former Minnesota Director of Lawyers Professional Responsibility, Michael J. Hoover, who stated that experience in Minnesota shows that applying the Rule broadly to reach loans to indigent clients who would otherwise be forced to accept inadequate settlements is not necessary to prevent unethical conduct. Mr. Hoover testified that Minnesota's version of DR 5-103(B) was changed in 1985 to explicitly permit such loans, and that adding this language to the Rule did not result in any problems in protecting the public from unprofessional behavior. *See* A12; Hearing Tr. at 240, 245.

Moreover, Mr. Hoover noted that lawyers are permitted to advance funds and acquire financial interests in the outcome of the litigation for other purposes. Under DR 5-103 of the Ohio Code, and the professional codes of Minnesota and other jurisdictions, attorneys are permitted to acquire an interest in the outcome of civil litigation (i) by contracting for a reasonable contingency fee; and (ii) by making advances or guaranteeing loans for litigation expenses for clients. *See* Ohio Code of Prof. Responsibility, DR 5-103; Minn. Rules of Prof. Conduct, Rule 1.8. The conflict of interest concerns raised by these permitted financial interests, Mr. Hoover testified, were not different from those presented by lawyers guaranteeing loans for living expenses. Hearing Tr. at 240-45. The Bar Association presented no counter-evidence to show any state interest in prohibiting attorneys from guaranteeing loans to impecunious clients, nor did it offer evidence of any

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[5] *See Louisiana State Bar Ass'n v. Edwins*, 329 So. 2d 437, 446 (La. 1976) (interpreting identical provision of Louisiana Professional Code to permit loans to indigent clients because applying rule would not promote purpose of the Code and would raise constitutional problems).

state interest in distinguishing loans for living expenses, which are prohibited, from loans for litigation expenses, contingency fees or other financial interests that lawyers are permitted to acquire under the Ohio rules.

Under Ohio procedures, disciplinary complaints are heard by the Board of Commissioners on Grievances and Discipline, which, in turn, makes a recommendation to the Supreme Court of Ohio.[6] A Hearing Panel of the Board heard all the evidence and made the following factual findings, which were adopted by the full Board of Commissioners on Grievances and Discipline:

> The testimony is uncontroverted that all the loans were given only to already existing clients who needed the money to withstand delays in litigation. There is no evidence of improper solicitation. Once it was determined loans were needed, they were facilitated openly from a regulated financial institution. These loans were made only after the clients personally convinced the respondents that the loans were needed. There is no evidence of any interference with Respondents' independent professional judgment.

A11-12 (record citations omitted), A3.

Although the Board found that none of the interests promoted by the Disciplinary Rule was implicated since there was no advertising or solicitation involved, and "no evidence that the independent professional judgment of either Respondent was compromised in any way," the Board concluded that the conduct was a clear violation of DR 5-103(B). A13-14. It recommended that petitioner and Mr. McGill be disciplined with a six-month suspen-

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[6] Ohio Gov. Bar. R. V, §§ 2, 6, 8; *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 654 (1985).

sion, to be stayed on the condition that there be no further violations of DR 5-103(B). A14.

Petitioner presented his federal claims to the Board, but the Board concluded that constitutional challenges were "beyond its jurisdiction to consider." A13. Petitioner's federal challenges under the First and Fourteenth Amendment and the Supremacy Clause (and other arguments) were then presented to the Ohio Supreme Court. *See* A30-A34. In a *per curiam* opinion, the Court affirmed the Board's conclusion that financial assistance to needy clients, even when made to withstand delays in FELA litigation, are prohibited under Ohio's Code of Professional Conduct. The Court did not discuss the federal claims. Although it noted that petitioner's arguments against DR 5-103(B) "warrant some review," the Court entered judgment against petitioner based on the Board's findings, and reduced the Board's recommended penalty to a public reprimand. *See* A4-5. Two judges dissented on the basis that the recommended penalty should not have been reduced. A5-6.[7]

On September 23, 1992, respondent filed a motion for reconsideration based on the Ohio Supreme Court's failure to discuss his preemption and other constitutional challenges. A35. The motion was denied, without opinion, on October 28, 1992. A15.

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[7] During the course of the disciplinary proceedings, on December 11, 1991, a petition was submitted to the Ohio Supreme Court to amend DR 5-103(B) to explicitly recognize an exception for loans needed to withstand delays in litigation, as has been done in Minnesota and other jurisdictions. *See* A27, A13, A4 n.1. No amendment of the Rule has been adopted, however.

SUMMARY OF REASONS FOR GRANTING THE WRIT

Most states now have disciplinary rules that, like the Ohio rule at issue here, prohibit lawyers from providing financial assistance to clients they represent in litigation, with the exception of advances for litigation expenses. When applied to forbid any assistance for medical and living expenses needed to survive delays in litigation, as Ohio did here, these rules deny personal injury claimants, including FELA claimants, the assistance needed to obtain a hearing to vindicate valid claims. This Court should grant certiorari to review two sets of important constitutional issues presented by the Ohio Supreme Court's decision in this case.

1. The decision below raises important constitutional issues under the Supremacy Clause because it involves the use of state disciplinary proceedings to discipline attorneys representing claimants under a *federal* statute in *federal* court for conduct that the federal courts have explicitly approved because it fosters the vindication of federal rights. The FELA and the standards of professional conduct in federal court proceedings are governed by federal law. But in the decision below Ohio has encroached on federal rights and on the authority of federal courts by prohibiting attorneys from guaranteeing loans for FELA claimants — despite the fact that federal courts have declared that such loans are ethical precisely because they are often needed to preserve the claimants' right to just resolution of their FELA claims. Because virtually all members of the federal bar are subject to state disciplinary rules that may be inconsistent with federal law, this use of state authority over attorneys to impose a prohibition that is contrary to federal law raises important issues concerning the ability of states to trespass on the federal courts' authority over attorney conduct, and to impair the ability to obtain relief under the FELA.

2. The decision below also raises important constitutional questions under this Court's decisions concerning the rights of access to the courts under the First Amendment, and the Due Process and the Equal Protection Clauses of the Fourteenth Amendment. The use of state disciplinary rules in Ohio, and other states, to prohibit lawyers from providing financial assistance to indigent clients who will otherwise be forced to abandon or accept an inadequate settlement of their claims because of financial hardship caused by court delays is inconsistent with the decisions of this Court holding that states cannot enforce professional conduct or other rules that impose unjustified or arbitrary barriers on access to the courts. Review by this Court is warranted because, by prohibiting attorneys from guaranteeing loans such as those involved here, states may deprive a wide range of personal injury claimants of the financial assistance needed to survive prolonged litigation and resolve their claims on the merits, without serving any legitimate state interest in preventing improper solicitation or conflicts of interest.

REASONS FOR GRANTING THE WRIT

This Court has recognized that defendants can, and often do, use the delays inherent in litigation to force claimants to accept quick and cheap settlements, particularly in FELA actions. *See Brotherhood of Railroad Trainmen v. Virginia*, 377 U.S. 1, 3-4 (1964). " 'The importance of financial aid from his lawyer to an injured workman may spell the difference between injustice and justice.' " *In re Ruffalo*, 249 F. Supp. at 444 (quoting *Mahoning County Bar Ass'n v. Ruffalo*, 176 Ohio St. 263, 199 N.E.2d 396, 403 (Herbert, J., dissenting)). Court delays can slow final resolution of a claim for years, and railroads and other defendants can wait-out indigent claimants until they are forced to abandon their claims altogether, or settle them for a small percentage of their reasonable value. " 'In short, the powerful can close the

doors of the courts to the weak by reason of the lack of finances of the claimant.' " *Id.*

This barrier to just resolution of FELA claims is strengthened when state disciplinary rules are applied, as Ohio has done here, to prohibit attorneys from guaranteeing loans for medical and living expenses that clients need to survive prolonged litigation and resolve their claims based on the merits. The problem is not limited to Ohio, however. Most states now have rules that prohibit attorneys from providing financial assistance to clients they represent in litigation, with an exception only for litigation expenses. These rules are not only a vestige of the ancient prohibitions on champerty and maintenance, but are actually more restrictive than the common law. Prior to the ABA's adoption of the Model Code of Professional Responsibility in 1969, most cases recognized that it was not improper for attorneys to provide advances for living expenses to assist indigent clients "where without such aid [the client] would be unable to enforce a just claim."[8] But most jurisdictions have displaced the common law principles and canons with codes by adopting DR 5-103(B)

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[8] *People ex rel Chicago Bar Ass'n v. McCallum*, 341 Ill. 578, 173 N.E. 827, 831 (1930); *see generally* Annotation, 8 A.L.R. 3d 1155, 1158, 1176-77 (1966) (reviewing cases and summarizing general rule as permitting loans for living expenses where loans are not used for solicitation); Note, *Loans to Clients for Living Expenses*, 55 Cal. L. Rev. 1419, 1421-23 (1967) (cases prior to 1955 "favored loans for living expenses, recognizing that with them clients might withstand unjust settlement offers they would otherwise accept out of necessity"); Note, *Guaranteeing Loans to Clients Under Minnesota's Code of Professional Responsibility*, 66 Minn. L. Rev. 1091, 1093-99 (1982) (cases interpreting common law and Canons of Ethics adopted by the ABA in 1908 generally approved loans for living expenses). The principal pre-1969 authorities concluding that assistance for living expenses is flatly prohibited were ABA Formal Opinion No. 288 (Oct. 11, 1954), and the Ohio Supreme Court's decision in *Mahoning County Bar Ass'n v. Ruffalo*, *supra*.

of the ABA Model Code, Rule 1.8(e) of the 1983 ABA Model Rules of Professional Conduct, or comparable provisions, which contain no express exception for such loans.[9] Despite criticism that prohibiting all loans for

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[9] *See Waldman v. Waldman*, 118 A.D.2d 577, 499 N.Y.S.2d 185 (2d Dep't 1986) (language of DR 5-103(B) prohibits advances of money motivated solely by concern for client's financial plight that would have been proper under the former Canons of Ethics); C. Wolfram, *supra* § 9.2.3 at 508-509 & nn. 86-88 (pre-Code authority was divided, but most decisions under the Code hold assistance with living expenses is prohibited, no matter how needful the client); ALI, Restatement of the Law Governing Lawyers, Tent. Draft No. 4, § 48 at 227, 231 (April 10, 1991) ("Loans going beyond litigation expenses are barred in most jurisdictions").

All together, forty-five states have adopted rules against financial assistance that provide no explicit exemption for living or medical expenses. *See infra* note 10 (describing jurisdictions that have such exemptions). Many, like Ohio, have adopted the language of DR 5-103(B) of the Model Code of Professional Responsibility. *See supra* at 1. Over half the states have now adopted Model Rule 1.8(e), which provides:

> A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation except that: (1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and (2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of a client.

The final draft version of Model Rule 1.8(e) contained language permitting advances of "reasonable and necessary medical and living expenses," *see* Final Draft of the Model Rules of Professional Conduct, 67 *ABA Journal* 12 (Spec. Supp., Oct., 1981), but it was amended to remove this language before final adoption. G. Hazard and W. Hodes, *The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct*, 274 (2d Ed. 1992 Supp.) Nevertheless, the Model Rule is more liberal than DR 5-103 because it does not require that the "client remains ultimately liable for [financial assistance with litigation] expenses." Thus, the attorney is permitted to finance litigation expenses without the assurance that they will be repaid by the client.

living expenses is unjustified and prejudices the rights of needy claimants, only a few jurisdictions have adopted rules that explicitly permit such assistance.[10]

The Ohio Supreme Court's decision in this case places the constitutional infirmities of rules that prohibit loan guarantees needed to withstand litigation delays in particularly sharp focus because (i) the decision is contrary to the Ohio federal courts' determination that such loans should be permitted, and (ii) the findings of fact below demonstrate that the ban does not serve any of the state interests behind the ethics rules. The only result of applying the state rule to bar the loan guarantees at issue in this proceeding is to prevent needy clients who have valid claims under the FELA from obtaining the financial assistance necessary to survive until they can have their claims heard in federal court. Thus, this rule falls within a familiar pattern of cases in which prophylactic disciplinary rules have been declared unconstitutional when applied in a manner that does not serve the interests behind the rule. *See Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 644-45 (1985); *In re Primus*, 436

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[10] *See* A27, Minn. Rules of Professional Conduct, Rule 1.8(e)(3) (lawyer may guarantee loan needed to withstand delays in litigation); N.D. Rules of Prof. Conduct, Rule 1.8(e)(3) (same); A28, D.C. Rules of Prof. Conduct, Rule 1.8(d) (lawyer may provide financial assistance necessary to maintain litigation); Ala. Rules of Prof. Conduct, Rule 1.8(e)(3) (permitting emergency financial assistance); Texas Rules of Professional Conduct, Rule 1.8(d)(1) (permitting advances for reasonably necessary medical and living expenses); Cal. Rules of Professional Conduct, Rule 4-210(A)(2) (permitting loans to clients). Louisiana has recognized such an exception by narrowly interpreting DR 5-103(B) as not prohibiting loans to existing clients for necessary living expenses. *Louisiana State Bar Ass'n v. Edwins*, 329 So.2d at 446. Other jurisdictions, however, have concluded that such interpretations are foreclosed by the language of their code or rules. *See Waldman v. Waldman*, *supra*; *Committee on Professional Ethics v. Bitter*, 279 N.W.2d 521, 523 (Iowa 1979).

U.S. 412 (1978). Regardless of the general validity of the rule, it is unconstitutional when applied in a manner that serves no state interest, but " 'operates to deprive an individual of a protected right.' " *Little v. Streater*, 452 U.S. 1, 16 (1981) (quoting *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971)). The decision below should be reviewed by this Court because it infringes on both the rights protected by the FELA, and the constitutional rights of access to the courts protected by the First and Fourteenth Amendments.

I. OHIO'S APPLICATION OF ITS PROHIBITION ON LOAN GUARANTEES FOR LIVING EXPENSES TO LOANS FOR FEDERAL FELA CLAIMANTS, WHEN SUCH GUARANTEES HAVE BEEN APPROVED BY THE FEDERAL COURTS, PRESENTS AN IMPORTANT ISSUE UNDER THE SUPREMACY CLAUSE THAT SHOULD BE RESOLVED BY THIS COURT.

The FELA was enacted to create a federal right to compensation for injured railroad employees that would displace state "common-law rules that sometimes made recovery difficult or even impossible." *Brotherhood of Railroad Trainmen*, 377 U.S. at 3. In order to protect these federal rights, this Court has on several occasions granted certiorari to make clear that federal rights are not "defeated by the forms of local practice," *Brown v. Western Railway of Alabama*, 338 U.S. 294, 296 (1949), and underscore that "federal law governs cases under the [FELA]." *Dice v. Akron, Canton & Youngstown Railroad Company*, 342 U.S. 359, 361-62 (1952). In doing so, the Court has held that state procedural and pleading rules that impair the right of workers to vindicate their rights under the FELA are preempted by federal law, even when state courts are exercising concurrent FELA jurisdiction. *See Monessen Southwestern Railway Co. v. Morgan*, 486 U.S. 330, 335-36 (1988); *Norfolk and Western R. Co. v. Liepelt*, 444 U.S. 490, 493 (1980); *Brady v. Southern*

Railway Co., 320 U.S. 476 (1943); *Central Vermont Railway Co. v. White*, 238 U.S. 507 (1915).

In addition, this Court has made clear that the rules of professional conduct in federal courts are controlled by federal law, and not by state law. *In re Snyder*, 472 U.S. 634, 645 n.6 (1985); *In re Ruffalo*, 390 U.S. 544, 547 (1968). Efforts by states to exercise their disciplinary authority in a manner that conflicts with federal law and impairs the ability of attorneys to vindicate federal rights are preempted. *See Sperry v. Florida*, 373 U.S. 379 (1963) (state law against unauthorized practice of law preempted by federal law licensing patent attorneys). A state cannot hinder or obstruct "the right to perform the functions within the scope of the federal authority." *Id.* at 385.

The discipline imposed by the Supreme Court of Ohio's actions cannot be reconciled with either of these lines of authority. First, by applying a state disciplinary rule to FELA cases, the Ohio Supreme Court has imposed standards that are inconsistent with the standards of conduct established by the federal courts. The discipline imposed here is contrary to the decision of the federal District Court for the Northern District of Ohio specifically rejecting the Ohio Supreme Court's view and concluding that it would be unjust to prohibit attorneys from guaranteeing such loans for FELA claimants. *In re Ruffalo*, 249 F. Supp. at 442-45. It is also inconsistent with the evidence showing that the federal court in Ohio still endorses such assistance. A26.[11] The implications of the

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[11] The Ohio federal courts are not alone. *See* N.D. Ill. Local Rules, Gen. R. 39 (providing that, for good cause shown, court may approve advances by attorney to client for living costs); *Jahn v. Champagne Lumber Co.*, 157 F. 407, 418 (W.D. Wisc. 1908) ("It has never been held violative of law or public policy to give financial aid

(continued...)

use of state disciplinary authority to interfere with the representation of clients in federal court is not limited to the FELA, however. Virtually all attorneys practicing in federal court are members of state bars that may have disciplinary rules that are contrary to federal law. Under the Supremacy Clause, states cannot be permitted to punish attorneys litigating in federal court for taking actions that the federal courts have authorized.

Second, by prohibiting attorneys from representing FELA claimants in a manner that has been expressly approved by the federal courts, the Ohio Rule specifically frustrates the ability of FELA claimants to obtain the fair hearing of their claims under federal law. The Supremacy Clause prohibits states from obstructing federally protected rights to relief in this manner. *Cf. Brown v. Western Railway*, 338 U.S. at 296 (state pleading rule cannot be used to defeat rights protected by the FELA). For example, a state could not impose an ethics rule prohibiting attorneys bringing class actions in federal court from communicating with potential class members, because such a rule would be inconsistent with the policies behind the federal class action rule. *Cf. Gulf Oil Co. v. Bernard*, 452 U.S. 89, 99-102 (1981). Likewise, a state could not frustrate the enforcement of federal legislation by prohibiting attorneys from entering into reasonable contingent fee arrangements, or forbidding advances for litigation expenses, where such practices are consistent with federal law and help to vindicate the federal rights at issue. *See County of Suffolk v. Long Island Lighting Co.*, 710 F. Supp. 1407, 1414-15 (E.D.N.Y. 1989) (DR 5-103(B) restrictions on advancing litigation expenses preempted insofar as they

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[11](...continued)
to a poor suitor who is prosecuting a meritorious cause of action. . . . The law does not tolerate the notion that a powerful defendant may force the abandonment of a suit whenever he is able to exhaust the slender means of a weak antagonist.")

are inconsistent with national policies that underlie class actions); *accord Rand v. Monsanto Co.*, 926 F.2d 596, 600-01 (7th Cir. 1991); *Baylson v. Disciplinary Board of the Supreme Court of Pennsylvania*, 764 F.Supp. 328, 348-49 (E.D. Pa. 1991).

The disciplinary rule at issue here is preempted for the same reason. The federal courts in Ohio have declared that guaranteeing loans for indigent FELA claims is ethical and assists in vindicating the rights created by Congress under the FELA. Enforcement of the state's contrary rule in cases involving assistance to FELA claimants undermines the rights created by Congress by denying claimants the assistance that they need to resolve their claims based on the merits, rather than financial desperation. Moreover, the existence of similar disciplinary rules in other jurisdictions prevents, or at least deters, such assistance to FELA claimants because of the threat that states may use their regulatory authority over attorneys to prevent assistance to claimants in FELA cases, or similar actions under federal law.[12]

Accordingly, the decision below undermines both the authority of the federal courts and the rights protected by the FELA. This Court should grant certiorari to remove the inconsistency between the state and federal

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[12] This Court's decision in *Brotherhood of Railroad Trainmen*, rested on the First Amendment rather interference with the federal FELA rights in violation of the Supremacy Clause. *See United Mine Workers*, 389 U.S. 217, 224 n.9 (1967) (decisions in *Button* and *Brotherhood of Railroad Trainmen* did not rest on state interference with federal programs, so they are equally applicable to litigation involving rights created by state law). Nevertheless, the Court did note that "[a] State could not, by invoking the power to regulate the professional conduct of attorneys, infringe in any way the right of individuals and the public to be fairly represented in lawsuits authorized by Congress to effectuate a basic public interest." *Brotherhood of Railroad Trainmen*, 377 U.S. at 7.

ethical standards, and declare that federal law controls whether or not attorneys can guarantee loans needed for FELA claimants to withstand delays in litigation.

II. STATE RULES PROHIBITING ATTORNEYS FROM GUARANTEEING LOANS FOR CLIENTS WHO NEED FINANCIAL ASSISTANCE TO WITHSTAND LITIGATION DELAYS IMPAIR RIGHTS OF ACCESS TO THE COURTS PROTECTED BY THE FIRST AND FOURTEENTH AMENDMENTS, AND PRESENT IMPORTANT CONSTITUTIONAL ISSUES THAT SHOULD BE SETTLED BY THIS COURT.

Prohibiting loans for living expenses of clients who, without such financial assistance, will be unable to have their day in court also presents important constitutional issues under the decisions of this Court concerning the rights protected by the First Amendment, and by the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Lower courts have repeatedly questioned the constitutionality of applying these rules to impede the ability of indigent personal injury claimants to pursue their claims in Court. *See Louisiana State Bar Ass'n v. Edwins*, 329 So.2d 437, 446 (La. 1976); *In re Teichner*, 75 Ill. 2d 88, 387 N.E.2d 265, 271-72 (1979). These important issues should be resolved by this Court.

This Court's decisions have declared that the First Amendment, and the Due Process and Equal Protection Clauses of the Fourteenth Amendment establish closely related and, to some extent, overlapping restrictions on states' abilities to impose prohibitions that handicap access to the courts. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430 n.5 (1982). Ohio's ban on assisting needy clients to withstand delays in litigation by guaranteeing bank loans fails to satisfy the tests established by the Court under each of these provisions.

A. The First Amendment. This Court has recognized that litigation, and assistance to litigants, is protected by the First Amendment. *NAACP v. Button*, 371 U.S. 415, 429-30 (1963); *accord In re Primus*, 436 U.S. at 431-32. Moreover, the Court has specifically held that efforts to assist injured workers in pursuing FELA claims are protected by the First Amendment, *Brotherhood of Railroad Trainmen*, 377 U.S. 1 (Virginia prohibition on union plan for advising injured workers to obtain representation of union-approved attorneys for FELA claims violates First Amendment). The First Amendment interests recognized in *Button* are equally applicable to litigation "solely designed to compensate the victims of industrial accidents." *United Mine Workers v. Illinois State Bar Ass'n*, 389 U.S. 217, 223 (1967).

These cases hold that state professional conduct rules that handicap the ability to provide assistance to litigants must be drawn "with narrow specificity." *Button* 371 U.S. at 433, 438. Prophylactic rules aimed at preventing maintenance of baseless litigation or conflicting interests may not be applied broadly unless the state demonstrates a "substantial regulatory interest, in the form of substantive evils flowing from the petitioner's activities, which can justify the broad prohibitions which it has imposed." *Id.* at 444; *accord United Mine Workers v. Illinois State Bar Ass'n*, 389 U.S. at 222-23; *Brotherhood of Railroad Trainmen v. Virginia*, 377 U.S. at 7-8. Moreover, the state's interest must not be speculative or theoretical; the state bears the burden of making a "showing of a serious danger here of professionally reprehensible conflicts," to justify the rule. *Button*, 371 U.S. at 443; *accord Brotherhood of Railroad Trainmen*, 377 U.S. at 8. Thus, "the burden is on the State to present a substantial government interest justifying the restriction . . . and to demonstrate that the restriction vindicates that interest through the least restrictive means." *Zauderer*, 571 U.S. at 647.

This Court's holdings in *Button* and *Brotherhood of Railroad Trainmen* were summarized in *United Mine Workers v. Illinois State Bar Ass'n*, which held that applying Illinois' rules against the unauthorized practice of law to prohibit a union from hiring a lawyer to handle workmen's compensation claims for its members violates the First and Fourteenth Amendments. The state prohibition on solicitation struck down in *Button* violated the First Amendment, the Court said, because "the dangers of baseless litigation and conflicting interests" it purported to prevent were "far too speculative to justify the broad remedy invoked by the State." *Id.* at 223. Likewise, in *Brotherhood of Railroad Trainmen v. Virginia*, Virginia's prohibition on a union plan for advising injured workers to obtain representation by union-approved attorneys to assist them in pursuing FELA claims was found unconstitutional because there was only "a theoretical possibility" of conflict of interests, and this "distant possibility of harm could not justify" the prohibition on the union's efforts to assure that "each injured member would be justly compensated for his injuries." *Id.* In *United Mine Workers* the state's prohibition was struck down because "there was absolutely no indication that the theoretically imaginable divergence between the interests of the union and member arose in the context of the particular lawsuit," *id.* at 224, and the state failed to produce any evidence that permitting assistance to injured workers would result in any harm to the public. *Id.* at 225.

Subsequent cases have reaffirmed these principles in concluding that certain prophylactic disciplinary rules of Ohio and other states are unconstitutional under the First Amendment. *See, e.g., Gentile v. State Bar of Nevada*, ___ U.S. ___ (1991); *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 472-78 (1988); *Zauderer*, 471 U.S. at 639-48; *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977). These cases firmly establish that state disciplinary rules that infringe on First Amendment rights cannot be applied indiscriminately

to circumstances where the conflicts of interest or other substantive evil the rules purport to regulate are absent, or are merely hypothetical. *See In re R.J.M.*, 455 U.S. 191, 207 (1982); *In re Primus*, 436 U.S. at 436.

Ohio's application of its prohibition on financial assistance to clients to the conduct at issue here cannot withstand scrutiny under the test in *Button* and its progeny. The decision below plainly frustrates access to the courts. The state acknowledged that the loan guarantees were given only to clients who demonstrated a need for financial assistance in order to continue to pursue their claims during the delays in litigation. Thus, prohibiting such guarantees strengthens defendants' ability to force claimants to accept settlements based on financial hardship, and prevents indigent clients from pursuing valid claims. By barring the financial assistance necessary for claimants to survive court delays and resolve their claims on the merits, the rule infringes on rights protected by the First Amendment.

The state's own findings establish that there is no countervailing state interest to justify this infringement. The Board acknowledged that the loans were made through an independent financial institution, that there was no improper solicitation, and that there was no conflict of interest involved. Indeed, the state was unable to identify any state interest served by prohibiting loans for living expenses needed to allow claimants to survive court delays and obtain a hearing on their claims.[13] While the rule reduces litigation by limiting the ability of impecunious clients to pursue their claims through pretrial

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[13] *See also In re Ratner*, 194 Kan. 362, 399 P.2d 865, 874 (1965) (where there is no improper solicitation, loaning money to client so he could live until case was tried rather than being forced to settle does not present any of the evils addressed by rules against maintenance).

delays, this does not reflect a legitimate state interest but, to the contrary, underscores the constitutional infirmities of the rule. This Court has made clear that "we cannot endorse the proposition that a lawsuit, as such, is an evil. . . . That our citizens have access to their civil courts is not an evil to be regretted; rather it is an attribute of our system of justice in which we ought to take pride." *Zauderer*, 471 U.S. at 643. Thus, by prohibiting financial assistance needed to permit litigants to have their day in court, the state unconstitutionally violates rights protected by the First Amendment.

B. Due Process. A client's cause of action under the FELA is plainly "a species of property protected by the Fourteenth Amendment's Due Process Clause." *Logan v. Zimmerman Brush Co.*, 455 U.S. at 428-31; *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). The Due Process Clause protects access to the courts to obtain a hearing on such claims, and requires that state laws that deprive litigants of that access be justified by an overriding state interest. "[H]aving made access to the courts an entitlement or a necessity, the State may not deprive someone of that access unless the balance of state and private interests favors the government scheme." *Logan* 455 U.S. at 430 n. 5; *see also Little v. Streater*, 452 U.S. at 13-16; *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976) (due process requires balancing private interests, and risk of erroneous deprivation, against government's interests); *Boddie v. Connecticut*, 401 U.S. at 377.

Ohio's prohibition on guaranteeing loans for living expenses to clients who need financial assistance in order to withstand delays in litigation cannot withstand scrutiny under this balancing test. The private interests affected by the prohibition are substantial. The prohibition on obtaining assistance for living expenses not only burdens, but

may deprive, indigent claimants of their right to obtain a hearing on their claims:

> If an impoverished person is unable to secure subsistence from some source during disability, he may be deprived of the only effective means by which he can wait out the necessary delays that result from litigation to enforce his cause of action. He may, for reasons of economic necessity and physical need, be forced to settle his claim for an inadequate amount.

Louisiana State Bar Ass'n v. Edwins, 329 So.2d at 446.

Indeed, the impact of the rule is particularly acute in personal injury claims, like the FELA claims at issue here, where the claimant's need for assistance and the claim of entitlement that has been delayed are directly linked. In such actions, the claimant alleges that it is the defendants' tortious conduct that resulted in the injuries that give rise to his or her medical expenses and loss of earnings — but, without financial assistance, the claimant will be unable to survive the delays necessary to obtain a hearing on his or her entitlement to compensation for these very same losses. This Court has recognized that delays in resolving a claim of entitlement to funds that are needed for the claimant's support raise special constitutional concerns. *See Goldberg v. Kelley*, 397 U.S. 254, 264-65 (1970) (due process requires pre-termination hearing where claim is for benefits that provide essential means of support). The prohibition on financial assistance imposed by Ohio not only ignores this problem, but assures that defendants that are allegedly responsible for the claimants' hardship also have every incentive and opportunity to use litigation delays to place even more economic pressure on injured FELA claimants in order to deprive them of their day in court. *See* C. Wolfram, *supra* § 9.2.3 at 509.

On the other hand, no countervailing substantial state interest is advanced by applying this prohibition to the type of loans prohibited by the Ohio Supreme Court here. Narrower rules, drawn to recognize that it is permissible to guarantee a loan that "is needed to withstand delay in litigation that otherwise might unjustly induce the client to settle or dismiss a case because of financial hardship rather than on the merits," adequately protect the state's interest in preventing unethical conduct. ALI, Tentative Draft No. 4, *Restatement of the Law Governing Lawyers* § 48(2)(b), pp. 224-25, 227-28; *see* A27-29; *supra* note 10 (describing rules of other jurisdictions permitting loans for living expenses).

In the proceedings below, the Toledo Bar Association asserted that the prohibition raised no due process concerns by relying on *United States v. Kras*, 409 U.S. 434 (1973), and *Walters v. National Association of Radiation Survivors*, 473 U.S. 305 (1985). Those decisions are plainly inapposite. In *Kras* the Court concluded that there was no due process violation presented by conditioning discharge of debts in voluntary bankruptcy on the payment of filing fees because bankruptcy was not a fundamental right. This case, however, involves denial of the right to a hearing on a property right claim under FELA — a fundamental right protected by the Due Process Clause. In *Walters*, the Court upheld a limitation on attorneys fees because the administrative hearings provided to claimants were designed to be informal, nonadversarial, and favor the claimant. 473 U.S. at 323-24, 333-34. There was no contention that the claimants were deprived of their right to a hearing, only that they were effectively denied the ability to retain counsel. In contrast, the only hearing FELA claimants may obtain is a formal, adversarial hearing in court, and the claimants who cannot survive

court delays without financial assistance are wholly deprived of *any* hearing.[14]

C. Equal Protection. The Equal Protection Clause requires that state rules drawing distinctions that impose particular burdens on the right to be heard "must be kept free of unreasoned distinctions that can only impede open and equal access to the courts." *Rinaldi v. Yeager*, 384 U.S. 305, 310-11 (1966). Accordingly, this Court has held that state rules that limit the rights of particular categories of claimants by creating distinctions that are not rationally related to legitimate governmental objectives are unconstitutional under the Equal Protection Clause. *Logan*, 455 U.S. at 439 (Blackmun, J., concurring); *id.* at 444 (Powell, J., concurring); *see also Lindsey v. Normet*, 405 U.S. 56 (1972) (special requirement that defendants in summary ejectment proceedings post double bond to appeal violates equal protection).

Ohio's disciplinary rules violate the Equal Protection principles established in these cases by flatly prohibiting loans for medical and living expenses, while permitting attorneys to acquire interests in the outcome of the litigation through other means. The different treatment afforded various financial interests under the Ohio Rules is not "reasonably tailored to achieve" any state interest. *Lindsey v. Normet*, 405 U.S. at 78-79. The state permits lawyers to enter into agreements for contingent fees and advance costs for litigation expenses because

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[14] The decision in *Ortwein v. Schwab*, 410 U.S. 656 (1973), is distinguishable for the same reason. In *Ortwein* this Court held that a $25 filing fee to appeal decisions rendered after a state administrative hearing did not violate the due process clause because the claimants were afforded an administrative hearing that satisfied the requirements of due process. No such administrative hearing is available here. *See Little v. Streater*, 452 U.S. at 16 n.12 (where interest is constitutionally significant and no alternative forum exists, case is comparable to *Boddie* rather than to *Kras* and *Ortwein*).

these practices "may be the only way a client can enforce his cause of action."[15] But the state arbitrarily forbids all loans for medical or living expenses — even though such advances may be equally necessary for clients to enforce their rights.

This arbitrary distinction leads to irrational results. Under the Ohio rules, attorneys can advance funds to pay a physician to perform a medical evaluation of a client's injuries in preparation for trial, but cannot guarantee a loan to pay for the treatment of those same injuries — even when the treatment is necessary to mitigate the harm from the injury. In addition, loans for medical and living expenses are prohibited regardless of the amount or circumstances, while advances for litigation costs are unlimited. Thus, the rules permit attorneys to make advances for litigation expenses that may result in their acquiring a substantial interest in the outcome of the claim, but prohibit any guarantees for living expenses — no matter how modest those expenses are in relation to the claim. These distinctions are not justified by any interest in preventing attorneys from acquiring a financial stake that would impair professional judgment, as such impairment depends upon the amount of the advances or interest, not the type of expenses needed to pursue the litigation.

Moreover, the burden imposed by the prohibition obviously falls only upon poor clients, and places a particular burden on claimants who are in need of financial assistance precisely because they have been injured, and their request for compensation has been delayed in the courts. Such claimants, because they are unable to obtain financial assistance, may be foreclosed from pursuing their claim for the loss wages and injuries that give rise to their financial distress "no matter how

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[15] Ohio Code of Professional Responsibility, EC 5-7, 5-8.

meritorious their case may be." *Lindsey v. Normet*, 405 U.S. at 79; *cf. Goldberg v. Kelley*, 397 U.S. at 264-65. Thus, the different treatment afforded to living and medical expenses, litigation expenses, and contingency fees, is not rationally related to any legitimate governmental purpose, and merely serves to impair the rights of needy clients to pursue legitimate claims that they are entitled to compensation to cover their living and medical expenses.

For all these reasons, the application of state professional codes to prohibit loans for living expenses in order to withstand delays in litigation, as Ohio has done here, presents important constitutional issues that should be resolved by this Court.

CONCLUSION

The Court should issue a writ of certiorari to review the federal constitutional challenges to the Supreme Court of Ohio's application of DR 5-103(B) to prohibit loans for medical and living expenses needed in order for FELA claimants to withstand delays in litigation.

Respectfully submitted,

Michael E. Tankersley
(*Counsel of Record*)
David C. Vladeck
Alan B. Morrison
Public Citizen
Litigation Group
2000 P Street, N.W., Suite 700
Washington, D.C. 20036
(202) 833-3000

Mark H. Aultman
Charles W. Kettlewell
150 East Wilson Bridge Road
Suite 200
Worthington, Ohio 43085
(614) 436-2750

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Counsel for Petitioner